Office-Supreme Court, U.S.
FILED
APR 22 1983
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CLERK

No. 82-766

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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SECRETARY OF STATE OF MARYLAND,
*Petitioner,*

v.

JOSEPH H. MUNSON COMPANY, INC.,
*Respondent.*

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**On Writ of Certiorari to the Court of Appeals of Maryland**

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## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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### INTEREST OF THE AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide organization of over 200,000 members. It was founded over 60 years ago to preserve and protect the fundamental principles of the Bill of Rights. The ACLU of the National Capital Area is the Washington, D.C. affiliate of the ACLU. Both *amici* engage in fund raising in the State of Maryland.

The ACLU's interest in this case stems from the organization's longstanding concern to protect the rights secured by the First Amendment, and from the possibility that the Maryland statute challenged here may, as inter-

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[1] Letters from the attorneys for Petitioner and Respondent expressing their consent to the filing of this brief are filed herewith.

preted by Petitioner, restrain the ACLU's own fund-raising efforts.

## STATEMENT

At issue here is the constitutionality under the First and Fourteenth Amendments, of a Maryland statute prohibiting "charitable organizations" from incurring fund-raising expenses which exceed 25 percent of the funds collected.

The Respondent, Joseph H. Munson Company, Inc. (hereinafter "Munson"), raises funds for various chapters of the Fraternal Order of Police, an organization engaged in the "dissemination of information and the advocacy of causes on behalf of police officers." Pet. App. 39a.[2] The Maryland Court of Appeals held that Munson was threatened with injury because the Montgomery County, Maryland, chapter of that organization "would not contract with Munson" and the Petitioner "would seek prosecution of Munson," because the contracts Munson proposed exceeded the 25-percent limitation. Pet. App. 11a.[3] Munson brought suit against the Petitioner,

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[2] "Pet. App. ——" refers to the appendix to the petition for certiorari filed in this case. "Pet. Br." refers to Petitioner's Brief, and "Amici Br." to the brief of nine States as *amici* for Petitioner.

[3] The court held that Munson had standing to sue because it "has clearly suffered injury," *id.*, and was entitled to assert the First Amendment rights of the Fraternal Order of Police because the "statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship." *Id.*, citing, *inter alia*, *Craig* v. *Boren*, 429 U.S. 190, 194-97 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 112-18 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-36 (1925); *Baltimore* v. *A.S. Abell Co.*, 218 Md. 273, 281-82, 145 A.2d 111, 115 (1958). Indeed, this Court has conferred standing upon litigants to challenge state laws when the mere possibility of future enforcement of those laws threatened the constitutional rights of the litigant or of persons with whom the litigant did business. *Craig* v. *Boren*, 429 U.S. at 194-97; *Doe* v. *Bolton*, 410 U.S. at 188-89; *Pierce* v. *Society of Sisters*, 268 U.S. at 535-36. More-

seeking a declaratory judgment and an injunction against enforcement of the 25-percent limitation, alleging violation of the First and Fourteenth Amendments.

After a hearing upon a stipulated record, the trial court dismissed Munson's action and the Maryland Court of Special Appeals affirmed, but the Court of Appeals of Maryland reversed and directed the entry of judgment for Munson.

The case is here on petition for certiorari granted January 10, 1983.

### 1. *The Decision Below.*

The Maryland Court of Appeals held unanimously that the State's statutory scheme violates the First and Fourteenth Amendments, under *Village of Schaumburg* v.

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over, the requirement of substantial overbreadth created by this Court in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-18 (1973) is inapplicable here because the activities of Munson on behalf of the Fraternal Order of Police are precisely those advocacy-related solicitations which this Court found to be entitled to full First Amendment protection in *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U.S. 620, 635-36 (1980).

Finally, if this Court determines that Munson has no standing here, then it should simply dismiss certiorari as improvidently granted. *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952); *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471 (1945); *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 414 (1900). These cases stand for the proposition that when a state court decides the merits of a federally-based challenge to a state law, this Court must simply allow the decision to stand if it finds that it cannot decide the dispute because of a lack of standing or other related concerns. As Justice Rehnquist stated in his role as Circuit Justice for the Ninth Circuit, "The courts of a state are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Article III of the United States Constitution." *Bateman* v. *Arizona*, 429 U.S. 1302, 1305 (1976).

*Citizens for Better Environment*, 444 U.S. 620 (1980). The Maryland court found the essential teachings of *Schaumburg* to be: (1) that charitable solicitations, like religious solicitations, are protected by the First Amendment; (2) that a percentage limitation on fund-raising costs is a direct and substantial limitation on protected speech; and (3) that such limitations are contrary to the First Amendment's requirement that speech restraints must be narrowly drawn to serve "a strong, subordinating interest" of government, and be the least restrictive means of achieving that intent. Pet. App. 14a-15a.

The Maryland court concluded that the percentage limitation at issue here is not carefully drawn to serve the State's asserted purpose of preventing fraud, that it interferes with nonfraudulent activities, and that there are other ways to control fraud that do not unduly infringe First Amendment rights. Pet. App. 19a. The court relied upon this Court's observation in *Schaumburg* that, because of the variable circumstances facing charitable organizations, many expend more than 25 percent of their receipts for administrative and solicitation expenses, and may not on that account be labelled "fraudulent" by a governmental body. Pet. App. 15a, citing 444 U.S. at 636-37. It pointed to this Court's conclusion that "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation," such as (1) the direct prohibition of, and punishment for, fraudulent representations; and (2) requirements for the disclosure of the finances of charitable organizations. Pet. App. 15a, citing 444 U.S. at 637-38.

The court below rejected the State's claim that Maryland's law is saved from constitutional infirmity because the statute delegates power to the Petitioner to waive the 25-percent limitation upon a finding that the limitation "would effectively prevent the charitable organization from raising contributions." Md. Ann. Code art. 41

§ 103D(a) (Supp. 1982).[4] The court held that (1) the Petitioner's authority to issue regulations and grant waivers is impermissibly vague, and (2) the exemption is "extremely narrow" insofar as it is limited to cases of necessity, whereas in *Schaumburg* "the Court clearly indicated that charitable organizations making a policy decision to use more than 25 percent of the proceeds raised for purposes other than 'charitable' had a constitutional right to do so." Pet. App. 20-21a, citing 444 U.S. at 637.

Finally, the court concluded that the criminal penalty is not a penalty for fraud at all:

> "[I]f one fails to meet the 25 percent expense limitation . . . and has not obtained a permit from the [Petitioner] waiving the limitation, he is criminally liable regardless of whether he had made fraudulent misrepresentations." Pet. App. 19a.

Thus, the court held, the statute is in no sense a prohibition against fraud; it is simply a strict limitation on the funds that an organization may expend in fund raising.

### 2. *The Maryland Statute.*

The percentage limitation at issue here is part of Maryland's Charitable Organizations Law, which embodies a series of regulatory controls over "benevolent, philanthropic, humane, patriotic, religious or eleemosynary" organizations that solicit funds from the public for "charitable purposes." § 103A. Petitioner's regulations define "charitable purpose" as including "religion, health, education, social welfare, arts and humanities, and civic and public interests," Code of Md. Regs. ("COMAR") 01.02.04.01G, so that virtually every form of voluntary public interest and advocacy organization is covered other than political parties, political committees, political clubs and State or local governmental agencies, which the statute specifically exempts. § 103A(b). Covered organizations are required to file registration statements with the

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[4] Subsequent statutory references are to the Md. Ann. Code art. 41 unless otherwise specified.

Secretary of State comprising complete financial records, including a balance sheet, an income and expense statement and a financial report disclosing gross income, costs and expenses of fund raising and the allocation and disbursement of gross income. § 103B(a). Such filings become public records. § 103G.

The statute prohibits charitable organizations from paying or agreeing to pay as expenses more than 25 percent of the funds contributed as a result of fund-raising activity. § 103D(a). Certain organizations, including "bona fide" religious, educational, community and civic groups are exempt from the statute's registration and disclosure requirements in specified circumstances, § 103C, but are nevertheless subject to the percentage limitation. *See* COMAR 01.02.04.02A(1).

To implement the percentage limitation, Petitioner is required (1) to establish rules and regulations for the reporting of actual costs, and accounting rules governing the allocation of expenses relating to fund raising; and (2) to issue appropriate rules and regulations, and to grant waivers allowing a charitable organization to exceed the 25-percent limitation "in those instances where the 25-percent limitation would effectively prevent [it] from raising contributions." § 103D(a).

Petitioner's accounting rules require that "expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses." COMAR 01.02.04.04A(3).

To obtain a waiver of the 25-percent limitation, Petitioner requires a showing that the waiver is "necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." COMAR 01.02.04.05B(1). The only examples of such necessity listed in the regulations are:

> "(a) When there are extraordinary, unusual, and non-recurring circumstances . . .; and (b) When an

organization is less than 2 fiscal years old and in the developmental stage." COMAR 01.02.04.05B(2).

Other provisions of the statute directly prohibit certain fraudulent representations, § 103J, and require professional fund-raiser counsel or solicitors to register with Petitioner, post a $10,000 bond, pay an annual fee of $100, and list the names of all officers, agents and employees. § 103F.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Like every other human institution, charitable, religious and public interest organizations have occasionally been charged with acts of dishonesty and inefficiency. But there are no studies and no data which establish that these defects are more widespread among associations of citizens voluntarily banded together in their common expressions of public service than among commercial, industrial and governmental organizations. Moreover, the press coverage of financial abuses among charities is aggressive, and there is no reason to think it is not effective.

The percentage limitations imposed by 19 States on voluntary organizations, however, reflect an attitude of suspicion and impose mechanistic tests of honesty evident nowhere else in society. Petitioner and the *amici* States admit that these statutes restrain First Amendment rights, but argue that they comply with the Constitution's requirement that any such restraint be both necessary and carefully tailored to serve compelling governmental interests.

In tacit acknowledgment that the statutes do not regulate fraud carefully or with sufficient respect for the rights of free speech, the States also argue that voluntary associations are wards of the state, subject to *parens patriae* control, by virtue of doctrine founded upon the Statute of Charitable Uses, 43 Eliz. ch. 4 (1601). Such power—to control the revenue-raising discretion of all

forms of voluntary associations, including public interest advocacy groups which are often in serious opposition to the government—clearly offends the rights of Free Speech, Free Assembly and Free Religion. The assertion of the power here is a dramatic illustration of the vagueness of the authority sought to be vested in Petitioner.

Maryland's statute, imposing a percentage limitation with a "necessity" exception, is more offensive to constitutional values than the straight percentage limitation held to violate First and Fourteenth Amendment rights in *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U.S. 620 (1980). It impairs constitutional rights by submitting the solicitation efforts of religious, public interest and advocacy organizations to the subjective decision of a State official as to whether such costs are necessary to the raising of funds. Such a "necessity" exception is inadequate to protect the First Amendment rights of organizations which have made policy decisions to spend money in order to raise money to improve the fulfillment of their functions, and is therefore contrary to even the narrowest construction of *Schaumburg*. The Fifth Circuit's decision in *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which the Petitioner relies upon heavily to support its argument for reversal, is not inconsistent with the ruling of the court below; it is no longer followed by the Fifth Circuit; and its application here would be contrary to settled First Amendment principles.

With or without the waiver's authority, the statute fails the basic test for restraints on First Amendment rights. It cannot well serve any important governmental interest, since there is no evidence to support a percentage limitation as a valid method of identifying fraud. The statute's purported objectives could better be served by means less invasive of constitutional rights such as: (1) statutes aimed directly at fraudulent representations, and (2) disclosure laws that make contributors aware of how their money is being spent.

## ARGUMENT

### I. The Waiver Provision of Maryland's Statute Does Not Permit Accommodation of the Policy Choices of Advocacy Organizations and Delegates Impermissibly Vague Discretion to a Government Official

Petitioner's principal argument is that its 25-percent limitation on charitable fund-raising costs, which otherwise is very similar to the provision struck down by this Court in *Schaumburg*, is saved from constitutional infirmity by the "flexible" waiver provision contained in Section 103D(a), which allows a charity to exceed the percentage limitation where the limitation "would effectively prevent the charitable organization from raising contributions."[5] As authority for this argument, Petitioner cites *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which the State asserts was impliedly endorsed in *Schaumburg*. Petitioner claims that its statute escapes the ban of *Schaumburg* because it falls within the principle said to be established by the *Fort Worth* case, in which a percentage limitation on fund-raising costs, combined with a waiver provision for reasonable expenses which exceeded that limit, was found to pass constitutional muster.

This argument has no merit. Whether or not Petitioner is correct in claiming that the 1969 decision of the Fifth Circuit in *Fort Worth* is still good law after *Schaumburg*, the provision at issue here is nonetheless invalid. Its waiver provision is at once too narrow to accommodate the policy choices apparently available to voluntary associations under the Fort Worth ordinance,

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[5] Petitioner's regulations, promulgated under authority granted by the statute, authorize a waiver if the organization can demonstrate to the Secretary of State that its fund-raising expenses are "necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." COMAR 01.02.04.05B(1).

and at the same time commits unduly vague authority to Petitioner.

The Fort Worth ordinance created a 20-percent limit on charitable fund-raising expenses, but permitted the City's Commission on Charitable Solicitations to waive the limitation upon a showing by an organization that its fund-raising costs were "not unreasonable." 415 F.2d at 44 n.2. On the other hand, in Maryland a waiver of the limitation requires that an organization persuade a member of the Governor's Cabinet that the 25-percent limit would "effectively prevent the charitable organization from raising contributions."

There are substantial differences between the grounds for waiver in Fort Worth and Maryland, as demonstrated by the following example: Assume that an advocacy-oriented organization has for several years collected $100,000 yearly, with solicitation costs of $24,000, just within Maryland's 25-percent limitation. The organization then decides to increase the scope of its advocacy efforts, and raises $200,000, but spends $52,000 in the process—just over 25 percent. The next year it becomes more ambitious and collects $400,000, at a cost of $160,000, or 40 percent. In Fort Worth an official could easily find that this organization's stepped-up advocacy campaign and increased percentage of fund-raising expenses were entirely "reasonable." However, a Maryland official could not find that the 25-percent limit would "effectively prevent the charitable organization from raising contributions" because it had previously operated for several years with fund-raising expenses under the 25-percent limit.

The court below therefore correctly found that the statute abridged the freedom of voluntary associations to make their own policy choices in the area of fund raising, contrary to this Court's decision in *Schaumburg* that organizations which in good faith exceed percentage limitations on fund-raising costs may not validly be "lumped

with those engaging in fraud." Pet. App. 21a, citing 444 U.S. at 637. As in *Schaumburg*, the statute fails to recognize that "the costs incurred by charitable organizations conducting fund-raising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." 444 U.S. at 637 n.10.[6]

Viewed in another light, Maryland's statute is contrary to prior decisions of this Court which have established that permit schemes which give local officials great discretion to interfere with the operation of voluntary associations are invalid under the First Amendment. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620-22 (1976); *Largent* v. *Texas*, 318 U.S. 418, 422 (1943); *Schneider*

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[6] As the Maryland high court recognized, Pet. App. 21a, and despite Petitioner's claims, it is not at all clear that the *Fort Worth* decision would survive the scrutiny of this Court after *Schaumburg*. Indeed, in a case decided since *Schaumburg*, the Fifth Circuit itself impliedly rejected the reasoning of its earlier decision in *Fort Worth*. *Fernandes* v. *Limmer*, 663 F.2d 619 (5th Cir. 1981), *reh'g denied*, 669 F.2d 729 (5th Cir.), *cert. dismissed*, 103 S. Ct. 5 (1982). In *Fernandes*, a religious organization challenged a permit system of the Dallas-Fort Worth Regional Airport Board that set a 25-percent limit on solicitation costs. Higher costs were "presumed to be unreasonable," but the presumption was rebuttable "upon good cause shown." *Id.* at 638-39. In court, the Airport Board relied primarily on the close similarity of its ordinance to that in *Fort Worth*. *Id.* at 630. Nonetheless, the Fifth Circuit invalidated the Airport Board's ordinance, finding that *Schaumburg* held that "the realm of religious and charitable organizations" whose rights to solicit funds were protected by the First Amendment "includes groups whose unorthodox messages will inevitably yield less cost-effective solicitation results." *Id.* at 631.

The *Fernandes* court also found it significant that while the Fort Worth percentage limitation ordinance excluded religious organization from its ambit, the Airport's ordinance did not, and thus suffered an additional infirmity: "The First Amendment says we do not question such good faith religious commitments." *Id.* Like the provision in *Fernandes*, Maryland's law also subjects religious organizations to a percentage limitation. Petitioner's reliance on *Fort Worth* is thus misplaced.

v. *State*, 308 U.S. 147, 163-64 (1939); *see* also Rehnquist, J., dissenting in *Schaumburg*, 444 U.S. at 640, 643 & n.1.

Maryland's Secretary of State construes the statute as a delegation of discretion to determine whether an organization's fund-raising expenses are "necessary to the accomplishment of the organization's charitable purpose" and whether there is "no other reasonable alternative." COMAR 01.02.04.05B(1). This vague set of standards allows a State official to pass on the comparative efficiency of fund-raising methods and to limit fund raising to his conception of what fits the organization's "charitable purpose." This law could thus be employed to control the scope of an organization's fund-raising efforts, the way it delivers its message, the nature of the message itself and, most importantly, to restrict the organization's very purpose. The authority to waive the arbitrary 25-percent limit thus creates the possibility of "censorship through license which makes impossible the free and unhampered distribution" of ideas. Such restriction "strikes at the very heart of the constitutional guarantees" of the First Amendment. *Schneider* v. *State*, 308 U.S. at 164.

As if to demonstrate the vagueness of the discretion conferred by the statute, Petitioner claims that its power extends beyond that of controlling fraud, which was the subject of *Fort Worth* and *Schaumburg*. Proclaiming the purpose to "protect charities themselves from unscrupulous professional fund-raisers," in order to protect "public confidence" in the organizations, Pet. Br. 37-39, Petitioner would exercise virtually unlimited regulatory powers in determining whether to grant a waiver. Petitioner asserts that the statute is not limited in purpose to preventing fraud, but is "flexible," and authorizes what amounts to management control over fund-raising efforts. Petitioner grounds its position on the premise that the State must be considered to represent the public,

which is a "third party" in contracts between "charitable organizations and charitable fund-raisers." Pet. Br. 37.

Petitioner continues its efforts to justify pervasive controls by asserting that the trustees and directors of organizations are "not subject to the traditional profit and loss constraints of the market place or the scrutiny of shareholders and investors. . . . Most importantly, the direct and ultimate beneficiaries of charities—the poor, the disadvantaged, the handicapped and the general public—often are incapable of protecting their own interests." Pet. Br. 38. But *Schaumburg* has held that percentage limitations *per se* are crude, ineffective controls over fraud; they are no better means of controlling overreaching by fund raisers or ineptness on the part of the organizations. Petitioner therefore relies upon the "flexible" waiver power as a mechanism for control over the wisdom of the managers of voluntary organizations.

The opportunities for discrimination against organizations that have the burden of establishing the negative proposition that there is no other way of effectively raising funds are obvious. Hostility resulting in discrimination could readily arise either from narrow partisan concerns or deep policy clashes.

Even the most traditional charities could thus find their solicitation efforts hostage to the goodwill of a State officer and be required to support a particular State administration to secure relief from the percentage limitation. The claim of power to administer such broad discretion is particularly threatening, however, to the First Amendment rights of public interest and advocacy organizations, which often have heavy "solicitation" costs because they combine education, political activity and advocacy with fund raising. *Schaumburg*, 444 U.S. at 635-36.[7]

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[7] The burden this statute places upon advocacy groups is exacerbated substantially by Petitioner's regulation, COMAR

Apparently sensing the dangers in a statute authorizing such power, Petitioner asserts that "the Maryland law is being administered in a careful fashion with attention being paid to the First Amendment rights of advocacy groups." Pet. Br. 10. In addition, Petitioner argues that the State's Attorney General has advised that "the Secretary of State should not hesitate to grant waivers that are based on a responsible showing of justification, especially as regards the public interest type organization described in the *Schaumburg* opinion." 65 Op. Att'y Gen. 58, 65 (Md. 1980); *see* Pet. Br. 10.

There is no demonstration that Petitioner has exercised the suggested respect for the rights of advocacy groups.[8] Petitioner's argument, however, exposes the basic infirmity of a grant of broad discretionary power: the asserted generous respect for the rights of advocacy groups could just as well be exercised in the opposite direction.

The *amici* brief filed by nine States, three of whose statutes permit waivers of percentage limitations on various grounds,[9] demonstrate how such waiver power

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01.02.04.04A(3), which provides that the full cost of educational communications and activities must be counted as a fund-raising expense if any portion, however small, includes a request for contributions—even a request that is "implied."

[8] The evidence of such care is merely a tabulation revealing that only a few exemption requests were received in the last couple of years, and all but three were granted. Pet. Br. A.6.

[9] Those three states are Massachusetts, which allows an organization to agree to pay to a professional fund-raiser no more than 15 percent of contributions, Mass. Ann. Laws ch. 68, § 21, and limits a charity's total solicitation costs to 50 percent of gross proceeds, but allows a waiver of the latter provision if "it would be in the public interest to allow [the solicitation] from the public," *id.*, § 22; Pennsylvania, which limits a professional fund-raiser's compensation to 15 percent of gross proceeds, and total solicitation costs to 35 percent of gross proceeds, allowing a waiver of only the latter limit for a showing of "special facts or circumstances," Pa. Stat.

can provide the basis for broad discretionary regulation. *Amici* assert, first of all, that the percentage limitation provisions are not "primarily" for the purpose of controlling fraud at all. Amici Br. 25 n.12. Rather, they are intended to provide broad *parens patriae* control over the covered organizations. Amici Br. 19, 23-25.

In complete disregard of the fact that percentage limitation laws have a direct and heavy impact on public interest advocacy groups whose activities are often in direct conflict with State administrations, the *amici* hark back to the Statute of Charitable Uses of 1601 and claim power to act as a super board of directors for such organizations:

> ". . . Under for-profit corporation law, certain actions must be brought to the shareholders for vote or review . . . . A charity, instead of being accountable to private shareholders, is accountable to the indefinite public. The state has traditionally represented that public . . . A flexible state percentage falls within this tradition by providing for an independent state review when a charity decides because of special circumstances to spend more than a certain amount of the public's money on its own dreams of expansion." Amici Br. 32-33; to the same general effect *see id.* at 3, 5, 31-32, and 35-36.

It is obvious that the State's interest in protecting against charitable fraud and over-reaching does not comprehend such absolute control over all forms of voluntary associations, and it is clear that such control would constitute massive infringement of First Amendment rights. The fact that waiver provisions could be employed for that purpose should certainly condemn them.

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Ann. tit. 10, § 160-6; and Tennessee, whose law states that a charity's solicitation costs in excess of 25 percent of gross proceeds "create a rebuttable presumption that [they are] unreasonable, unless approved by the Secretary of State" on unspecified grounds. Tenn. Code Ann. § 48-2213(b).

## II. The Statute Does Not Serve a Compelling State Interest and Is More Intrusive upon Freedom of Speech Than Other Less Restrictive Measures

Even if the waiver authority did not itself offend First Amendment principles, it would not remedy the basic constitutional infirmity of the Maryland statute. *Schaumburg* establishes that charitable solicitations are entitled to First Amendment protection, and that controls over such solicitation must meet the well-settled test that they be (1) designed to serve a compelling governmental interest, and (2) no more intrusive on First Amendment rights than is necessary to achieve that compelling purpose. Maryland's statute fails both aspects of this test.

*First*, *Schaumburg* assumed that the ordinance there was intended to serve the compelling state interests of protecting against fraud and protecting the public streets. In the present case, the State claims the right to protect "another interest not even asserted in *Schaumburg*," Pet. Br. 37—to protect charitable organizations from "unscrupulous" fund raisers. As this term unfolds, and as it is elaborated upon in the brief of the *amici* States, it reveals a claimed governmental purpose to protect the supporters of covered organizations from weak or inattentive management. This purpose is not a "compelling state interest" warranting any intrusion on First Amendment rights.

Arguments derived from asserted common law authority to oversee "traditional charities"—institutions to help the poor, sick and aged—are irrelevant to the Maryland statute, which covers public interest, educational, religious, and advocacy groups of all kinds. There is no historical support or precedent for the notion that these latter organizations are subject to state oversight with respect to their financial decisions. Moreover, the freedoms of speech, assembly and religion are incompatible with any governmental power to review the financial wisdom

with which such organizations are managed, because financial decisions are inextricably related to policies and objectives. Accordingly, the First Amendment forbids government efforts to "protect voluntary" associations from "unscrupulous" fund raisers by exercising direct control over the organizations' expenditures.

This case does not present the question of a State's power to regulate professional fund raisers as such; the statute restrains charitable organizations from incurring fund-raising expenses that exceed the stated limit, whether or not the expenses reflect the charges of fund raisers. While there are other provisions in the statute designed to regulate fund raisers by means of license fees, registration and bonding, they are not at issue here. The question is whether Maryland has a legitimate interest in preventing a Fraternal Order of Police chapter from spending more money on fund-raising activities than Petitioner deems wise. If Maryland has the power to take such action, it has a basis for claiming analogous power to control salaries, consulting fees, research contracts, litigation expenses, public relations expenses, and lobbying fees of organizations such as the ACLU, the American Enterprise Institute, the National Rifle Association, the Council of Churches and the NAACP by direct controls over the expenditure of funds.

Clearly the government lacks power to manage the voluntary associations covered by Maryland's statute on any theory that they need to be protected from their own officers, employees, consultants, lawyers, accountants, publishers and broadcasters, all of whom, just like fundraisers, might be "unscrupulous" in demanding and receiving high fees for their services. If, as the *amici* States assert, these statutes are not "primarily" about fraud, then at least as to public interest advocacy groups, they serve no compelling state interest warranting any intrusion on First Amendment rights.

*Second*, a percentage limitation on expenses, even with exceptions for "necessary" or "reasonable" expenses in

excess of the percentage, is an invalid indicator of either fraud or mismanagement. Fund-raising expenses of 24.5 percent could be the product of fraud or poor management, and an organization with expenses of 25.5 percent could be perfectly honest and efficient. It is therefore arbitrary to impose special burdens on charitable organizations to justify expenses of 25 percent or more, and no State interest is served by the drawing of such a line.

As the Court said in *Schaumburg*, "The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." 444 U.S. at 637 n.10. For that reason, as the Court observed, protection against fraud is only "peripherally promoted" by percentage limitations. *Id.* at 636. "Peripheral" may be too kindly a term, if one may judge from a small sample offered by Petitioner's Exhibit A, Pet. Br. A.6, which discloses that Petitioner granted 13 exemptions over the period, of which the lowest contemplated expenses of 48 percent, five were between 70 percent and 77 percent, and five were between 80 percent and 85 percent.

Actually, there are no comprehensive studies or other data which support any percentage limitation. A 1975 study of 4260 charitable organizations that filed expense records in New York and Illinois shows that a 25-percent limit would affect a surprisingly large number, accounting for a substantial percentage of all charitable collections reported.[10] However, there are no studies that disclose the incidence or the amount of fraud associated with charitable solicitations.[11]

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[10] For example, charities accounting for 13.8 percent of contributions reported in Illinois and 9.6 percent of contributions in New York had solicitation costs greater than 25 percent. Gross, *Fund Raising and Program Cost Ratios*, 8 Philanthropy Monthly 28, 30 (June 1975).

[11] Petitioner's sole authority is an estimate in a law review note published in 1967. Pet. Br. 37, n.25, citing Note, *Charitable Solici-*

The absence of data and the confusion of purpose result in a variety of State percentage limitations, computed on a bewildering array of bases, which are in themselves testimony to the crudeness of such limits. Nationally the statutory limits on the books include 5 percent to professional fund raisers (North Carolina *);[12] 10 percent to professional fund raisers (Oklahoma); 15 percent to professional fund raisers (Kentucky *, New Jersey *, West Virginia *); 20 percent to profesisonal fund raisers (Hawaii); 25 percent to professional fund raisers (Arkansas, Florida, Tennessee); 30 percent to professional fund raisers (Minnesota *, South Dakota); 15 percent to professional fund raisers, 35 percent total solicitation costs (North Dakota *, Pennsylvania **);[13] 15 percent to professional fund raisers, 50 percent total solicitation costs (Massachusetts ***); 25 percent to professional fund raisers, 50 percent total solicitation costs (Rhode Island *); 20 percent total solicitation costs (Washington *); 25 percent total solicitation costs (Maryland ****); a variable percentage (25 to 50) to professional fund

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*tation Acts—An Attempt to Curb Charity Cheats*, 16 De Paul L. Rev. 472 (1967).

[12] Citations for the statutes described in this paragraph are found in the appendix to this brief at page 16a.

[13] Following *Schaumburg*, the North Dakota Supreme Court found that State's percentage limitation, N.D. Cent. Code § 50-22-04.1, to be an invalid infringement of the First Amendment rights of voluntary organizations in *State* v. *W.R.G. Enterprises*, 314 N.W.2d 842 (N.D. 1982).

* . . . . This State's law contains an adjustment for the actual costs of goods or services provided to the public in the calculation or calculations described.

** . . . . This State's law contains an adjustment for the cost of goods and services provided to the public in the calculation of total solicitation costs only.

*** . . . . This State's law contains an adjustment for the cost of goods and services provided to the public in the calculation of the percentage paid to professional fund raisers only.

**** . . . . This State's law excludes the costs of goods and services provided, feasibility studies, postage, and printing from the percentage calculation.

raisers, depending on the amount collected and the amount spent on goods or services provided to the public (Connecticut); and a "reasonable" percentage to professional fund raisers (South Carolina *).

In fundamental disregard of the principle of *Schaumburg*, no State attempts to adjust its percentage limitation to the distinctions between the methods of operations employed by traditional charities and by public interest advocacy groups; the same flat percentage formulae apply to all covered organizations. Indeed, Petitioner's regulations expressly consider an educational expense or activity to be entirely for fund raising if it includes even an "implied" appeal for financial support. COMAR 01.02.04.04A(3).

A basic defect of percentage limitations is that they disregard the lessons of the market place. Assuming that the organization is not engaged in self-dealing, it must secure fund-raising aid in the open market, and it pays the prices charged by the sellers of the goods and services it needs to conduct its campaign. This Court's decisions with respect to the Sherman Antitrust Law long ago recognized that there is no administrative way to determine whether prices are "reasonable." The task is impossible because conditions change from day to day, *United States* v. *Trenton Potteries*, 273 U.S. 392, 398 (1927), and because of the "dynamic quality of the business facts underlying price structure," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). These are the unremitting facts which confront any effort to second-guess the managements of the institutions in this huge industry, and no percentage limitation, even aided by a supplemental review as to "reasonableness" or "necessity," can be anything but arbitrary.

Petitioner seeks to avoid this point by suggesting that the percentage limitation is useful because the market is somehow inoperative where voluntary associations are concerned. Without reference to any studies or any verifiable evidence, Petitioner asserts that charitable or-

ganizations enter into "no-risk percentage fund-raising . . . without making a reasonable financial decision"; that "the conduct of trustees and directors of charitable organizations is not subject to the traditional profit and loss constraints of the market place or the scrutiny of shareholders and investors"; and that "the direct and ultimate beneficiaries of charities—the poor, the disadvantaged, the handicapped and the general public—often are incapable of protecting their own interests." Pet. Br. 38.[14]

Discussing a related point, the *amici* States ominously assert that decisions which might result in increased fund-raising costs are not choices "which should be entirely left to the charity," including the decision to espouse "an extremely unpopular cause," or to "expand one's donor base." [15] Amici Br. 31. The brief goes on to characterize such decisions as improper "dreams of expansion" which assertedly may be regulated by percentage limitations on fund-raising expenses. *Id.* at 33. However, such decisions —what to espouse and how to expand public support—lie at the very core of our First Amendment guarantees, and their regulation cannot be said to be "strong, subordinating interest[s] that [a State] is entitled to protect." *Schaumburg*, 444 U.S. at 636.

Even if these legislative aims can be molded to represent permissible State interests, mere assertion is a poor basis for imposing government control over the fund-raising efforts of the organizations involved, and the truth of the States' assertions is highly questionable. Voluntary

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[14] The *amici* States argue that the public must be protected from charities that enter into percentage fund-raising contracts in order to get "something for nothing," Amici Br. 51-52, and that a charity may forfeit its "good name and charitable appeal . . . without making a reasoned financial decision." *Id.* at 56-57.

[15] Because for an advocacy-oriented organization, an appeal for funds will often "necessarily combine" the "advocacy of public issues," *Schaumburg*, 444 U.S. at 635 (citation omitted), the decision to "expand one's donor base" is inextricably intertwined with an organization's choice of its audience and basic program.

organizations do have to compete year after year for contributions and, as people become less affluent and government less forthcoming, the competition is surely much stiffer. Outside the government there are many protectors of the charities and their beneficiaries: newspapers, magazines, books, radio and television stations, civic leaders and watchdog groups; and the boards of directors of the charities, who have successful business, professional, educational, and religious backgrounds, are no less competent than State officers.

In considering the asserted aims of the State, it is highly relevant that politicians and their appointees will not necessarily bring honesty and good financial judgment to the operations of charitable organizations. According to contemporaneous newspaper articles, the Maryland law was inspired in large part by disclosures in the press that the State's Governor and some of his political allies had received financial favors from a Pallotine Fathers mission that allegedly focussed more on investment activities than on missionary work.[16] It is ironic that the law should thereupon give a member of the Governor's cabinet the task of overseeing the finances of voluntary organizations.

Maryland's law is not only a poor means of serving a compelling State interest; it also fails the second portion of the standard test applied to restraints on First Amendment rights: that the restraint be the least intrusive measure capable of serving the government's compelling interest. In *Schaumburg* the Court pointed out that direct controls over fraud and misrepresentation, and public disclosure laws were good remedies for the evils described, and need involve no impermissible intrusion on solicitation rights. 444 U.S. at 637-38. These considerations apply with full force to the present case.

Maryland has statutory provisions dealing with misrepresentations concerning charitable solicitations; it has

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[16] *Washington Post*, Feb. 18, 1976, at B1; *id.*, Jan. 22, 1976, at A1.

laws dealing with professional fund-raisers; and most significantly it has a comprehensive financial disclosure law that was enacted simultaneously with the percentage limitation. The law requires complete filings with respect to the financial operations of charitable organizations, including the costs of fund raising. § 103B(a)(6). The filings are public records, § 103G, and are therefore available to the press and to watchdog organizations, as well as to interested potential donors. Charitable organizations are required to keep accurate financial records in a form that will make pertinent information available to the Petitioner. §§ 103B(a), 103H. Petitioner's annual report contains information about the financial aspects of the operations of charitable organizations. COMAR 01.02.04.03C.

Petitioner does not provide any basis for concluding that laws which directly prohibit fraud and require financial disclosure to the public do not give ample protection. Instead, Petitioner makes a curious argument that the 25-percent limitation with its "flexible" waiver authority is "far less burdensome than a comprehensive disclosure requirement would be." Pet. Br. 33. Petitioner objects that to assist in preventing fraud "effectively . . . a disclosure statute would clearly have to be both very comprehensive and readily available to the public," and could therefore constitute "significant encroachments of First Amendment rights," *id.* at 33-34. Indeed, there may be First Amendment problems with some kinds of disclosure as applied to some organizations. *E.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). But surely the fact that a particular disclosure provision might infringe on First Amendment rights does not negate the fact that disclosure laws are "the least restrictive means" of controlling fraud, and therefore constitutionally preferable to direct controls on expenses. *See id.* at 68.[17]

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[17] The disclosure provision of Maine's Charitable Solicitations Act, Me. Rev. Stat. Ann. tit. 9, § 5012, is an example of the use of a mandatory disclosure law to protect the public from fraud and to

## CONCLUSION

Maryland's statute impermissibly restrains First Amendment freedoms by granting broad discretion to a government officer to control the purse strings of public interest advocacy organizations whose programs often collide with State administrations. A State interest alleged to support it, the maintenance of efficiency among charitable organizations is neither a compelling government interest nor one that can be performed by a State officer without gross interference with First Amendment rights. The interest of the State to protect against fraud, while important, is minimally promoted by a percentage limitation, and can be better promoted by direct controls over fraud and by disclosure laws.

The judgment of the Maryland Court of Appeals should be affirmed.

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enhance donor input to the operations of voluntary organizations. The statute, which is unaccompanied by any percentage limitation on fund-raising costs, requires any person soliciting contributions to disclose to the prospective donor the percentages of contributions to be used for "program services," for "management," and for "fund raising," whenever the percentage to be used for program services is below 70 percent. "Program services" are defined as "activities directly related to the stated charitable purposes," and expressly exclude expenses related to "fund raising or management." *Id.* § 5003(10-A). In addition, Maine's disclosure law requires that professional fund raisers must in all cases disclose to potential donors all fund-raising expenses being incurred by the organization pursuant to their employment. Other sections of Maine's Charitable Solicitations Act require disclosure of the same information to the Secretary of State.

Respectfully submitted,

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# APPENDIX

## APPENDIX

Article 41 of the Annotated Code of Maryland provides, in pertinent part:

**§ 103A. Definitions.**

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(b) *"Charitable organization"* means an organization which is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious, or eleemosynary organization and solicits or obtains contributions solicited from the public for charitable purposes. It includes a chapter, branch, area, office, or similar affiliate soliciting contributions within the State of Maryland for a charitable organization which has its principal place of business outside the State. It does not include a political party, political committee, political club, or an agency of the State government, or of a political subdivision.

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**§ 103B. Registration of charitable organizations; required reports.**

(a) Every charitable organization located in this State which intends to solicit contributions within or without this State, or every charitable organization which intends to solicit contributions within this State or to have funds solicited on its behalf shall, at least 30 days prior to making any solicitation or authorizing or allowing a solicitation to be made on its behalf, file a registration statement with the Secretary of State upon forms prescribed by him. Thereafter, if the charitable organization intends to engage, or does engage, in solicitation, a registration form shall be filed within three months of the close of each fiscal year in which it so intends or does engage in solicitation. The president, chair-

man, or other principal officer of the charitable organization is personally responsible for timely filing the registration statement. The statement shall be accompanied by a signed affidavit and shall contain the following information with respect to the organization:

(1) Its name and the purpose for which it was organized;

(2) Its principal address and either the address of its officers in this State or, if it does not maintain an office in this State, the name and address of the person having custody of its financial records;

(3) The names and addresses of any chapters, branches, or affiliates in this State;

(4) The place where and the date when it was legally established, the form of its organization, and a reference to any determination of its tax-exempt status or change in its tax-exempt status under the Internal Revenue Code. A copy of the determination shall be filed with the statement;

(5) The names and addresses of its officers, directors, trustees, and principal salaried executive staff officers;

(6) Its balance sheet, income and expense statement, and a financial report (including the kind and amount of its gross income raised, costs and expenses incidental to the fund-raising activities, and the allocation and disbursement of gross income raised) prepared in accordance with generally accepted accounting principles for its most recently completed fiscal year.

In the event that:

(i) The total amount of gross income received equals or exceeds $100,000 an audit is required by an independent certified public accountant accord-

ing to the standards of accounting and fiscal reporting for voluntary health and welfare organizations;

(ii) The total amount of gross income received is less than $100,000 the Secretary of State at his discretion may require an audit as required in subparagraph (i).

(iii) An audit required by subparagraph (i) or (ii) above may exclude funds received from a governmental agency if audit of such funds is otherwise provided by the governmental agency.

(7) Whether it intends to solicit contributions from the public directly or have the solicitations made on its behalf by others;

(8) Whether it is authorized by any other governmental authority to solicit contributions;

(9) Whether it is or has ever been subject to an order of any court or administrative agency restraining or restricting its fund-raising activities, and, if so, such information pertaining thereto as the Secretary of State may require;

(10) The purpose or purposes for which the contributions to be solicited will be used;

(11) The name or names under which it intends to solicit contributions if different from that given pursuant to paragraph (a)(1) of this section;

(12) The names and residence addresses of the depository and of the persons who will have final responsibility for the custody of the contributions;

(13) The names and residence addresses of the persons responsible for the final distribution of the contributions.

(b) Each chapter, branch, or affiliate of a charitable organization, other than an independent mem-

ber agency of a federated fund-raising organization, shall either file a separate registration statement or report the information to its parent organization which shall then file a consolidated statement for its Maryland affiliates, chapters, and branches. An independent charitable organization member agency or a federated fund-raising organization shall file a separate registration statement, unless specifically exempted from doing so or unless the member agency does not engage in solicitation other than as a member of a federated fund-raising organization. A federated fund-raising organization shall file a separate registration statement as a charitable organization.

(c) Every organization under this subtitle which files a separate registration statement shall pay a fee of $25.

(d) Every charitable organization which intends to discontinue solicitation shall file a statement of its intention to terminate solicitation and a final financial statement, identical in content to the registration statement, within three months of the close of its fiscal year.

**§ 103C. Exemptions from registration.**

(a) The following charitable organizations are not required to file a registration statement if they do not employ a professional solicitor to solicit funds on their behalf or if they do not mail more than 500,000 solicitations for charitable contributions in any one year:

(1) An educational institution approved by the State Department of Education, either directly or by acceptance of its accreditation by an accrediting body recognized by that Department. However, the educational institution shall file with the Secretary of State a copy of the annual fiscal reports that it files with the State Department of Education.

(2) Persons requesting contributions for the relief of individuals specified by name at the time the solication is made if the gross amount of the contribution collected, without any deductions, are turned over to the named beneficiaries for their use.

(3) A charitable organization which does not intend to solicit and does not actually receive contributions from the public in excess of $5,000 during the year for which a registration statement would otherwise be required, if (i) all of its fund-raising activities are carried on by persons who are unpaid for their services, and (ii) no part of its assets or income inures to the benefit of or is paid to any officer or member of the organization.

(4) A nonprofit and charitable hospital or related institution which is required by law to file financial reports at least annually with the Department of Health and Mental Hygiene or an agency of it. However, the hospital shall file with the Secretary of State a copy of the annual fiscal report most recently filed with the Department of Health and Mental Hygiene.

(5) An organization which solicits only from among its members. A person who is granted a membership upon making a contribution as the result of solicitation is not a member for purposes of this exemption.

(6) A bona fide religious organization, its parent, or a school affiliated with it, if the religious organization, its parent, or the affiliated school has received a declaration of current tax-exempt status from the government of the United States.

(7) A local post, camp, chapter, department, or similarly designated element, or a county unit of such elements of a bona fide veterans' organization or a bona fide community service organization which

issues charters to local elements throughout the State; a bona fide community, civic, or improvement association; a bona fide fraternal or sororal organization; a bona fide organization of volunteer firemen; a bona fide volunteer ambulance association or bona fide volunteer rescue squad association; or a bona fide auxiliary or affiliate of any such organization, if all of its fund-raising activities are carried on by the members of the organizations or an affiliate of it, and the members receive no compensation for performing these activities.

(8) A parents and teachers association affiliated with any school covered in paragraph (1), or affiliated with a local board of education.

(9) A society for the prevention of cruelty to animals.

(b) A charitable organization claiming to be exempt from the registration provisions of this subtitle and which is about to or does solicit charitable contributions shall initially submit to the Secretary of State on forms prescribed by him, the name, address, and purpose of the organization and a statement setting forth the reason for the claim for exemption. However, if a charitable organization has local elements in this State the charitable organization may submit, on behalf of its local elements, the name, address and purpose of the organization and its local elements and a statement setting forth the reason for the claim for the exemption. If exempted, the Secretary of State shall initially issue a letter of exemption which may be exhibited to the public. A registration fee is not required of an exempt organization.

(c) Thereafter, a charitable organization shall certify to the Secretary of State, upon the initiative of the Secretary, a brief certification which shall

state that the status of the charitable organization is unchanged.

(d) A charitable organization claiming to be exempt from the registration provisions of this subtitle, shall report to the Secretary of State any change from its exempt status by registered mail within 10 days of the occurrence. Within 30 days after the change in status the organization shall file the registration statement in accordance with § 103B.

**§ 103D. Limitations on amount of payments for solicitation activities.**

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such

compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

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**§ 103F. Registration of professional fund-raiser counsel and professional solicitor; bonds.**

(a) A person may not act as a professional fund-raiser counsel or professional solicitor for a charitable organization unless he has first registered with the Secretary of State. Applications for registration shall be in the form prescribed by the Secretary of State, shall contain the information required by him, and shall be under oath. The application for registration by a professional fund-raiser counsel or a professional solicitor or renewal of it shall be accompanied by an annual fee of $100. A partnership, corporation or other entity which intends to act as a professional fund-raiser counsel or professional solicitor, may register for and pay a single fee of $100 on behalf of all its members, officers, agents, and

employees. However, the names and addresses of all officers, agents, and employees, of the professional fund-raiser counsel or professional solicitor, and all other persons employed to work under its direction must be listed in the application.

(b) Every professional fund-raiser and professional solicitor shall, at the time of making application, file with and have approved by the Secretary of State a bond in which the applicant shall be the principal obligor in the sum of ten thousand dollars ($10,000) with one or more sureties satisfactory to the Secretary of State, whose liability in the aggregate as such sureties will at least equal the sum and maintain the bond in effect so long as a registration is in effect. The bond shall run to the State of Maryland for the use of the State and any person who may have a cause of action against the obligor of the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct of solicitation actiivties. A partnership or corporation which is a professional fund-raiser may file a consolidated bond on behalf of all its members, officers and employees.

(c) Each registration is valid for one year and may be renewed for additional one-year periods upon application to the Secretary of State, payment of the renewal fee, and proof that the required bond, cash, or cash equivalent is and will remain in effect.

(d) If the Secretary of State finds that the application is in conformity with the requirements of this section and the rules and regulations adopted pursuant to it, and that the registrant has complied with the requirements of this subtitle and the rules and regulations adopted pursuant to it, he shall approve the registration. An applicant whose application for registration is denied, may within 30 days from the date of notification of the denial, request in writing

a hearing before the Secretary of State. A hearing shall be held within 60 days from the date the Secretary of State receives the request.

**§ 103G. Information filed to become public records.**

All registration statements, reports, professional fund-raiser counsel contracts, professional solicitor contracts, and other documents and information required to be filed under this subtitle with the Secretary of State are public records. They shall be maintained in the office of the Secretary of State for at least two years, and shall be available to the general public for inspection and photocopying, at reasonable prices, during the normal business hours of the Secretary of State.

**§ 103H. Records to be kept by charitable organizations.**

Every charitable organization shall in accordance with the rules and regulations prescribed by the Secretary of State, keep true and accurate fiscal records as to its activities in Maryland in such form as will enable it accurately to provide the information required by this subtitle. Upon demand, these records shall be made available to the Secretary of State for inspection. The records shall be retained for a period of at least three years after the end of the period of registration to which they relate.

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**§ 103J. Prohibited acts.**

(a) A charitable organization, professional fund-raiser counsel, and professional solicitor may not use or exploit the fact of registration so as to lead the public to believe that the registration in any manner constitutes an endorsement or approval by the State of Maryland. However, the use of the following statement shall not be deemed a prohibited exploita-

tion: "Registered with the Secretary of State of Maryland as required by law. Registration does not constitute or imply endorsement of a public solicitation for contributions."

(b) A person may not, in connection with the solicitation of contributions for or the sale of goods or services of a person other than a charitable organization, misrepresent to or mislead anyone by any manner, means, practice, or device, to believe that the person on whose behalf the solicitations or sale is being conducted is a charitable organization or that the proceeds of the solicitation or sale will be used for charitable purposes, if that is not the fact.

(c) A person may not in connection with the solicitation of contributions or the sale of goods for charitable purposes represent to or lead anyone by any manner, means, practice, or device to believe that any other person sponsors or endorses the solicitation of contributions, or sale of goods or services for charitable purposes, or approves of the charitable purposes or the charitable organization if the other person has not given consent to the use of his or her name for these purposes. Any member of the board of directors or trustees of a charitable organization and any other person who has agreed either to serve or to participate in any voluntary capacity in the campaign shall be deemed thereby to have given his consent to the use of his or her name in the campaign.

(d) A person may not make any representation that he is soliciting contributions for or on behalf of a charitable organization or use or display any emblem, device, or printed matter belonging to or associated with a charitable organization for the purpose of soliciting or inducing contributions from the public without first being authorized to do so by the charitable organization.

(e) A professional solicitor may not solicit in the name of or on behalf of any charitable organization unless the solicitor has:

(1) Written authorization of two officers of the charitable organization, a copy of which is filed with the Secretary of State. The written authorization shall bear the signature of the professional solicitor and shall expressly state on its face the period for which it is valid; and

(2) A copy of the authorization with him when he makes solicitations and exhibits it and personal identification on request to persons solicited.

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**§ 103L. Enforcement of subtitle; penalties.**

(a) A charitable organization, professional fund-raiser counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction, shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raiser counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a wilful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity.

(b) The Secretary of State is authorized, upon complaint or upon his own motion, to investigate alleged violations of this subtitle. If he finds that a charitable organization, professional fund-raiser

counsel, or professional solicitor has violated a provision of this subtitle, he may:

(1) Cancel and annul the registration of the violator;

(2) Refer the matter to the Attorney General for civil enforcement under subsection (c); and

(3) Refer the matter to the appropriate State's attorney for prosecution.

(c) Upon referral by the Secretary of State, the Attorney General may file a civil action in the Circuit Court for Anne Arundel County for an order restraining further violations of this subtitle, restraining the defendant from conducting any further fund-raising activities in Maryland, enforcing compliance with this subtitle, and such other relief as he deems appropriate. As a condition of registration, each charitable organization, professional fundraiser counsel, and professional solicitor shall consent in writing to the jurisdiction and venue of the Circuit Court for Anne Arundel County to grant appropriate relief.

(d) The Secretary of State shall adopt rules and regulations for the administration and enforcement of this subtitle.

The Code of Maryland Regulations provides, in pertinent part:

**01.02.04.01 Definitions.**

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G. "Charitable purpose" means any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose for religion, health, education, social welfare, arts and humanities, and civic and public interests.

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**01.02.04.02 Responsibilities of Persons Regulated.**

A. Exemption Organizations.

(1) An organization which is exempt from the registration requirement remains subject to all of the other regulatory provisions of the Act and these regulations.

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**01.02.04.03 Responsibilities of the Secretary.**

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C. Annual Report by the Secretary.

(1) The Secretary shall compile and print each July a report listing the professional solicitors, the professional fund-raiser counsel, and the organizations registered, and the organizations exempted from the registration requirement. . . .

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**01.02.04.04 Allocation of Expenses.**

A. Program Services Expenses. . . .

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(3) The expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses.

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**01.02.04.05 Twenty-five Percent Limitation.**

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B. Exceeding the 25-percent Limitation.

(1) The Secretary may permit an organization to exceed the 25-percent limitation contained in Article 41, § 103D(a), Annotated Code of Maryland, upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative.

(2) Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, include, but are not limited to, the following situations:

(a) When there are extraordinary, unusual, and non-recurring circumstances which can be factually supported; and

(b) When an organization is less than 2 fiscal years old and in the developmental stage.

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## CITATIONS TO STATE LAWS WITH PERCENTAGE LIMITATIONS ON FUND-RAISING COSTS

Arkansas. . Ark. Stat. Ann. § 64-1610

Connecticut. . Conn. Gen. Stat. § 19-323o

Florida. . Fla. Stat. ch. 496.11(8)

Hawaii. . Hawaii Rev. Stat. § 467B-7

Kentucky. . Ky. Rev. Stat. § 367.655

Maryland. . Md. Ann. Code art. 41, § 103D

Massachusetts. . Mass. Ann. Laws ch. 68, §§ 21, 22

Minnesota. . Minn. Stat. Ann. § 309.555

New Jersey. . N.J. Stat. Ann. § 45:17A-10

North Carolina. . N.C. Gen. Stat. § 108-75.11

North Dakota. . N.D. Cent. Code § 50-22-04.1

Oklahoma. . Okla. Stat. Ann. tit. 18, § 552.3B

Pennsylvania. . Pa. Stat. Ann. tit. 10, § 160-6

Rhode Island. . R.I. Gen. Laws § 5-53-4

South Carolina. . S.C. Code Ann. § 33-55-80

South Dakota. . S.D. Comp. Laws Ann. § 37-27-24

Tennessee. . Tenn. Code Ann. § 48-2213(b)

Washington. . Wash. Rev. Code Ann. § 19.09.100(1)

West Virginia. . W. Va. Code § 29-19-7